FINANCIAL ASSURANCES ENFORCEMENT REGULATIONS RESPONSE TO COMMENTS

(ALL COMMENTS ARE PARAPHRASED UNLESS STATED OTHERWISE)

Commentor #1 - City of West Covina, LEA

This commentor proposes the enforcement authority of the regulations be delegated to the Local Enforcement Agency. This commentor recommends the proposed regulations be modified to give the Local Enforcement Agency authority to enforce the financial assurance regulations. by replacing CIWMB with Enforcement Agency where appropriate.

Response #1 - City of West Covina, LEA

According to Public Resources Code, section 43600 an operator/owner of a solid waste landfill must submit evidence of financial ability to provide for the cost of closure and postclosure maintenance to the CIWMB. The CIWMB is the only agency reviewing and approving financial assurance mechanisms, submitted for closure and postclosure maintenance and operating liability for solid waste landfills.

The CIWMB, in conjunction with the California Conference of Directors of Environmental Health, conducted a survey of LEAs to determine the level interest from the LEAs in the financial assurance program. More than 80% of the LEAs surveyed noted that they did not wish to assume program responsibilities for financial assurances. In addition, the proposed AB 1220 regulations conform with the PRC section 43600, by giving the CIWMB the responsibility of administering and enforcing the financial assurances program. Consequently, there is no duplication in administering or enforcing the financial assurances program. These comments were noted but not accommodated.

Commentor #2 - Kern County, LEA

The commentor reviewed package and had no comments at that time.

Commentor #3 - City of San Diego

This commentor noted that the proposed regulations are appropriate and straightforward, but more specificity in the following areas would be helpful:

1. If an entity exhausts all administrative remedies, it may seek relief through the courts.

2. More language specifying when penalties may be imposed.

3. Referring to section 22275 (a) of the regulations, the commentor noted that Public Resources Code (PRC) section 45011 (a) (1) specifies that penalties cannot exceed $5,000 per day and $15,000 in any calendar year.

4. The commentor also noted that in section 22274 (b) (1) when adequate coverage has been provided no penalties should be assessed.

5. The commentor further noted that an emphasis should be placed on item (b) (7) of the same section regarding threats to public health and safety to ensure the protection of public health and safety.

Response #3 - City of San Diego

The provisions for seeking relief through the courts and specifying when penalties may be imposed are addressed in PRC sections 45040 through 45042, and sections 45010 through 45024 respectively. Sections 22276 and 22277 of these regulations make reference to the PRC provisions. This comment was noted but not accommodated.

The PRC section 45011 refers to civil penalties pursued administratively. If the CIWMB seeks penalties through the courts, the initial assessment may be as high as $10,000 per day per violation, as identified in PRC section 45023. Subsection (c) of section 22274 further clarifies this distinction by noting that the CIWMB may assess a total initial civil penalty of $15,000 or less administratively (pursuant to PRC 45011). However, the CIWMB may also assess a total initial civil penalty exceeding $15,000 through superior court (pursuant to PRC 45023). This comment was noted but not accommodated.

Section 22274 (b) (1) refers to evidence of adequate coverage which is provided to the CIWMB subsequent to the enforcement action. Penalties have already been assessed, and based on the evidence, a lesser penalty may be negotiated. The initial penalty was assessed based on an existing violation. This comment was noted but not accommodated.

Section 22274 (b) (7) identifies the threat to public health and safety and the environment as a factor the CIWMB may consider when modifying a penalty. The fact that this factor is last in the list of factors does not lessen its significance in determining penalty modifications. This comment was noted.

Commentor #4 - County of Ventura, LEA

This commentor focused on three issues:

1. Although the statute designates the CIWMB as being directly responsible for financial assurance, there is no statute precluding the CIWMB from entering into agreements with selected local enforcement agencies to allow an LEA to administer and enforce financial assurance on behalf of the CIWMB. This problem may be eliminated by adding wording to the regulations that recognizes the possibility of such agreements with LEAs.

2. The proposed regulations appear to be inconsistent with the Public Resources Code (PRC) that originated as a consequence of AB 59.

   - The CIWMB does not have an Independent Hearing Panel as required by Section 44308 PRC and is further required by Section 45011 PRC before the assessment of administrative civil penalties can take place. (*This comment is worded exactly as stated in this commentor's letter.*)
   - The proposed regulations do not provide for the procedures required in Section 45011 PRC, namely meetings with the violator, and since Section 45011(b) PRC provides that financial assurance violations are all "minor" violations administrative civil penalties can not be imposed until after the third violation. (*This comment is worded exactly as stated in this commentor's letter.*)
   - The draft regulations do not provide the notice to the board and possible Independent Hearing Panel hearing as provided in Section 45011(c)(1) PRC. (*This comment is worded exactly as posed in this commentor's letter.*)
   - The proposed regulations ignore the requirements for determining the amount of civil penalty contained in Section 45016 PRC and instead attempt to create a different set of determination factors. (*This comment is worded exactly as stated in this commentor's letter.*)

174

- The regula ions attempt to impose time frames for penalties not in conformance with Section 44310 PRC (*This comment is worded exactly as posed in this commentor's letter.*)
- The proposed regulations Ignore the agency notification requirements contained Section 45019 PRC but instead limits notification to the Local Enforcement Agency only. (*This comment is worded exactly as stated in this commentor's letter.*)

3. A further problem is that these proposed regulations provide for a Stipulated Notice and Order this in effect would be a permit by the CIWMB to allow an operator or owner to violate the law. This would be an unfortunate precedent. (*This comment is worded exactly as stated in this commentor's letter.*)

Response #4 - County of Ventura, LEA

1. The proposed regulations do not preclude the CIWMB from entering into an agreement with an LEA to allow an LEA to administer and enforce financial assurance requirements on behalf of the CIWMB. These regulations are specific to procedures that CIWMB staff will follow and does not affect the existing enforcement procedures an LEA may have in place. The regulations being promulgated as a result of AB 1220 specify the CIWMB as the agency responsible for administering and enforcing the financial requirements.

2. According to PRC 44309, the CIWMB acting as the enforcement agency must conduct a hearing with a hearing panel consisting of three CIWMB members selected by the chairperson of the CIWMB. According to 45011(c)(1) an administrative hearing may be conducted prior to imposing civil penalties.

   The proposed regulations do not specifically refer to meetings or negotiations, however, those specifics will addressed in the implementation of the regulations. It is the intent of these regulations to provide for continued communication between the CIWMB and operator to resolve the non-compliance issues. Violations of the financial assurances requirements poses a potential threat to the public health, safety and the environment and are major violations. Inadequate financial assurances may result in improper closure and maintenance of a landfill, which may result in:

   - contamination from leachate and vectors which may affect the health and safety of humans in surrounding communities and other animal life and organisms;
   - degradation of the environment.

   The proposed regulations do not preclude the CIWMB from notifying the governing body as identified in PRC, section 45011(c)(1). In the case where the CIWMB is the enforcement agency, an independent hearing panel is not applicable. These regulations are specific to CIWMB staff and do not apply to LEAs.

   The proposed regulations address the same factors identified in PRC, section 45016, although worded differently. The factors used in determining the level of liability are more specific to financial assurance requirements but encompass the intent of PRC, section 45016. For example the factors in section 22275 (b) regarding an operator's good faith efforts, willingness to comply and history of compliance all cover the factors identified in PRC 45016 (c), (d), (e), (f), and (g). Section 22275 (b) 1) and 2) also correlate with PRC 45016 (b).

The only timeframes identified in the proposed regulations are specific to responses to Notices of Violation and Notice and Orders and Stipulated Notice and Orders. PRC, section 44310 refers to timeframes governing hearings.

Although the regulations only mention the LEA, the proposed regulations do not preclude the CIWMB from notifying any and all agencies with jurisdiction over a site, when an enforcement action is being considered. The LEA is specifically mentioned because of the LEAs responsibility for permitting, closure plans and enforcement of other CIWMB standards.

3. A Stipulated Notice and Order is an agreement between the CIWMB and operator which includes directives and timelines for achieving compliance with the regulations, it is not a permit. It does not allow an operator to violate the requirements, but rather provides a vehicle for operators to achieve compliance in a manner acceptable to both the CIWMB and the operator.

Comment #5 - California Trade and Commerce Agency

This commentor expressed concern for consistency and clarity issues regarding AB 1220 and the proposed regulations. For example, terms such as operator, owner/operator, owner and operator and discharger are used throughout the AB 1220 regulations. These proposed regulations use the term "operator." The terms facility, site, unit, waste management unit, land disposal facility, landfill, LTU and SWFP were used throughout AB 1220. These proposed regulations use the term "disposal facilities."

It is imperative that terms used in all CIWMB Title 27 proposed regulations are consistent. Financial Assurances Section should coordinate with CIWMB's Enforcement Agency Section and the SWRCB to ensure the consistent use of terms. This will reduce the possibility of confusion among regulated parties and ensure that enforcement actions are based on specific violations, and not the result of an inaccurate interpretation of the regulation.

Section 22272(a) states that the CIWMB shall send a written Notice of Violation to the facility when an operator is in violation. This notice is actually sent to the operator, not the facility. The regulation should be changed to clarify this point.

Suggested changes in wording for clarification:

Section 22275(a)(1) is unclear. Change as follows: "The premium is multiplied by the number of years an operator is out of compliance (~~whole number~~ rounded up to the next whole year if a partial year of noncompliance exists)." ; and

Section 22276 should be changed to "Processing and collection of civil penalties shall be made ~~to~~ by the CIWMB...", or alternatively, the text could be written "The CIWMB shall process and collect civil penalties as provided in Public Resources Code..."

Response #5 - California Trade and Commerce Agency

CIWMB staff agree that consistency with terms throughout the different regulatory packages is necessary. Some of the inconsistencies are a result of inconsistencies in statutory language. For example, the Public Resources Code (PRC) is inconsistent with its use of owner and/or operator. There also inconsistencies in the statute with terms for a facility (e.g., landfill, unit, waste management unit,

176

landfill disposal facility etc.) The proposed regulations use the term "disposal facility" because it is a broad term encompassing the PRC operating liability requirements which refer to disposal facilities. Financial Assurances Staff have been and will continue to work with the appropriate CIWMB staff and other agencies to address the issue of inconsistencies with the use of terms. This comment was noted.

Section 22272(a) has been modified for clarification as follows: "The CIWMB shall send a written Notice of Violation to ~~a facility when~~ an operator violate~~s~~ing the requirements of Articles 1, 2 and 3 of Subchapter 2 of this Chapter (commencing with section 22205)."

Section 22275(a)(1) has been modified for clarification as follows: "... The premium is multiplied by the number of years an operator is out of compliance (~~whole number~~ rounded up to the next whole year if a partial year of noncompliance exists)."

Section 22276 has been modified for clarification as follows: "Processing and collection of civil penalties shall be made ~~to~~ by the CIWMB as provided in Public Resources Code, Division 30, Part 5, Article 3.(commencing with section 45010)."

Commentor #6 - WMX Technologies, Inc.

WMX Technologies, Inc. and Waste Management, Inc. (WMI) support the adoption of financial assurance enforcement regulations which will provide a clear, consistent and fair playing field for all solid waste facility operators. WMI supports the provisions that would ensure that financial assurance penalties are structured such that a solid waste operator would not derive any economic benefit or advantage from noncompliance. We have identified two issues we believe may benefit from some revision. We suggest the following changes to the regulations currently proposed:

1. Proposed section 22272 provides that an operator must respond within 10 working days from receipt to any NOV. Proposed section 22271 establishes a "potential for harm" which is based on the proximity to the date of closure. If the potential for harm is "moderate" or "minor" and the date of closure is several years away, is there really a need for an operator to respond within "10 working days"? If the "potential for harm" is "moderate" or "minor" we believe that an operator response within 30 days should be acceptable. For situations involving less than 2 years to closure, and major potential for harm, operator response within "10 working days" is appropriate.

2. Proposed section 22275(b) lists many appropriate factors that should be legitimately considered in determining the penalty amount for financial assurance violations. With one exception, WMI strongly supports the Board's reliance on these factors to modify penalty amounts.

However, WMI strongly objects to the "inability to pay" provision of proposed section 22275(b) as a legitimate basis for reducing a penalty amount. We are not aware of any regulation or rule of general application in California that provides penalty relief on the basis of "inability to pay". Penalties for financial assurance violations, in particular, should not be eligible for such relief. Why should a fiscally sound facility operator be subject to a higher penalty as compared to a fiscally marginal operator with the same violation? Indeed, failure to provide adequate financial assurance mechanisms compounded by fiscal mismanagement should not be rewarded by penalty reduction. Furthermore, assessment of an operator's "inability to pay" would involve the LEA and the CIWMB staff in a resource intensive, complex and highly subjective evaluation of an operator's financial records.

In reality, such penalty reduction is simply not necessary or warranted. A true situation involving insufficient funds will generally result in a bankruptcy filing. The court, not administrative agencies such as the LEA or CIWMB, should be responsible for the allocation of limited resources between claimants--including full and appropriate penalties sought by the LEA/CIWMB. Prior to any bankruptcy court decision, the LEA/CIWMB should take all necessary steps to induce violators to pay the appropriate full penalty amount -- in consideration of the other factors listed in proposed section 22275(b). The LEA/CIWMB, however, should defer decisions on "inability to pay" to bankruptcy courts.

On this basis, WMI requests that "inability to pay" be dropped from these proposed regulations as a basis for reducing penalty amounts.

Response #6 - Waste Management Technologies, Inc.

1. The ten working days provision in section 22272 is not based on "potential for harm" but rather is a noticing requirement indicating CIWMB staff have found a violation and must pursue resolution. The response to the Notice of Violation may not be demonstration of compliance but rather a phone call or letter from the operator expressing the intent to comply. This comment was noted but not accommodated.

2. CIWMB staff requested this issue be brought to the full Board for consideration on whether to keep or delete the "inability to pay" factor. The Board agreed with WMX's analogy that this factor provides an unfair advantage to operator's who do not comply with the financial assurance requirements and is inappropriate for financial assurance violations. This comment was noted, and changes to the regulations were made, deleting the "inability to pay" factor.

Commentor #7 - County of San Diego, LEA

We find the proposed language to be clear and concise. Our only concern is in the final section of the proposed regulations. Section 22278(a)(2)of the proposed regulations provides that the CIWMB may pursue action to revoke a permit in accordance with PRC 44306. It is our opinion that PRC 44306 grants the local enforcement agency, not the CIWMB, authority to revoke a permit. We suggest the proposed regulations 22278(a)(2) cite either PRC 43300 or 43101(c)(11) as granting the CIWMB the authority to pursue action to revoke a permit and/or pursue closure of a facility in violation of the financial assurances regulations.

Response #7 - County of San Diego, LEA

CIWMB staff agree the citation of the PRC section should be change to clarify the authority. This comment has been accommodated by changing the citation in section 22278(a)(2) to PRC section 43300, which is more appropriate and clarifies the authority issue.

Commentor #8 - Kern County Waste Management Department

The following comments are offered:

1. Section 22271. Definitions. a) 1): This section describes the "Degree of non-compliance" with financial assurance requirements and defines a "Minor" violation as "partially out of compliance with the requirement." the term "partially" is vague and non-descript. How is an operator "partially" out of compliance? Please define this term.

178

2. Section 22272. Notice of Violation.(d): This section states "an operator shall submit a response to a Notice of Violation within 10 working days from receipt of the Notice of Violation." With proper investigation and interoffice discussion, this 10-day period may be an insufficient period within which to respond. Please extend this timeframe to 20 working days.

Response #8 - Kern County Waste Management Department

1. The word "partially" is used in the strict sense of the dictionary meaning "not complete or total." It is possible for ar operator to have part of the financial assurance requirements met. For example, an operator may have an acceptable funding mechanism established, but that mechanism may be insufficiently funded. CIWMB staff believe redefining of the word "partially" is not necessary. This comment was noted, but not accommodated.

2. The 10 working days provision in section 22272 is a noticing requirement indicating CIWMB staff have found a problem and need to get it resolved. A response may be a request for further investigation and interoffice discussion between the operator and CIWMB. The response does not imply resolution of the violation. Extending the time period for an operator to respond to a Notice of Violation only prolongs resolution of the violation. This comment was noted but not accommodated.

Commentor #9 - Browning - Ferris Industries

In our view, the traditionally-applied "degree of non-compliance" and "potential for harm" criteria have little applicability to the typical violation of the financial assurance regulations -- the failure to have an acceptable mechanism in place for the demonstration of financial responsibility. Similarly, while we recognize that stipulated orders regarding immediate "partial" and ultimate "full compliance over a period of time" are commonplace, we do not believe that the use of such orders in situations in which a facility lacks an approved mechanism are appropriate.

The financial assurance requirements are one of the most important aspects of the State's solid waste management regulations. Accordingly, it is important that there be vigorous and evenly applied enforcement standards to ensure that facilities obtain and maintain appropriate financial assurance mechanisms. We recommend the CIWMB take the following steps to ensure that the enforcement criteria are meaningful and objectively applied, while facilitating the use of cost-effective financial assurance mechanisms.

1. Compliance Orders That Have the Effect of Extending Deadlines or Allowing a Period of Continued Noncompliance Should Be Coupled with Another Remedy, Such as a Civil Penalty.

A compliance order that does not include a civil penalty for failure to comply (or possibly, a mixed penalty/supplemental environmental project requirement) is relatively meaningless -- indeed, it simply asks the facility to comply, something it was required to do all along. The CIWMB's regulations should ensure that compliance orders include periodic reporting requirements and detailed requirements that must be met by a particular date(s). Orders should include a stipulated civil penalty of some sort, since compliance orders are usually not self-enforcing and it makes little sense for the agency to have to start over again in the event of continued noncompliance.

Stipulated penalties will help to ensure that violations of the intermediate and final compliance dates set forth in the order will be paid. To provide fairness to compliant facilities, the penalties should be at the

higher range of available penalties. Otherwise, the violator is better off financially than if he had complied at the proper tim

2. The Regulations Should Ensure That Courts have Authority to Impose Contempt Sanctions Upon Individuals and Entities That Fail to Comply with Compliance Orders.

State courts should have unambiguous authority to impose contempt sanctions upon parties that fail to comply with a compliance order. The regulations should clearly specify the right of courts to supervise the implementation of compliance orders. (*This comment is worded exactly as posed in this commentor's letter.*)

3. Administrative Consent Agreements Should Typically Utilize Stipulated (Liquidated) Penalties for Detected or Uncovered Future Violations.

Stipulated penalties should be included in compliance orders or agreements for future violations. The agreement or order could be structured to provide that the stipulated penalty would be increased or would be inapplicable in the event of a willful or reckless violation. Orders should expressly grant the agency the right to, in every case, reject the penalty amount and engage in any form of enforcement activity authorized by law.

4. Similarly, the Board's Regulations Should Make Clear the Ability of Courts to Impose Stipulated Penalties Pursuant to Judicial Order.

State courts should have unambiguous authority to impose and supervise stipulated penalties, which could be enforced through contempt sanctions.

5. The Regulations Should Expressly Authorize the Implementation of a Moratorium on Additional Waste Receipts--Without Triggering Mandatory Closure Obligations -- Upon Facilities that have failed to comply with the Financial Assurance Requirements.

The Board should be authorized to impose a moratorium upon additional waste receipts for uncorrected violations that are detected over a specified period (for example, six months or more). Of course, the moratorium should be preceded with notice to the facility, and once the notice is given, the Board should follow through the event that compliance is not promptly achieved.

6. The Board should promptly propose and promulgate, preferably as a part of this rulemaking proceeding, the proposed EPA tests for both the public and the private sectors.

Response #9 - Browning - Ferris Industries

The typical financial assurance violation is not the lack of an approved mechanism but rather inadequacies in the level of funding for acceptable approved mechanisms. If an operator has no approved financial assurance mechanism, then the "degree of non-compliance" is major, the level of "potential for harm" is based on the closure date for the facility in question. Therefore, the criteria "degree of non-compliance" and "potential for harm" are relevant and provide the foundation for the initial assessment of a penalty. The proposed rulemaking does not imply that stipulated orders may or will be used in situations where an operator has failed to establish an acceptable financial assurance mechanism. This comment was noted.

180

1. This comment is outside the scope of this rulemaking. Notice and Orders are currently addressed in Title 14, California Code of Regulations, Division 7, Chapter 5, Article 4, section 18304. The proposed rulemaking refers to section 18304 as the basis for Notice and Orders. CIWMB staff are currently revising section 18304 and may include provisions for Stipulated Orders. This comment would be more appropriately addressed in this future rulemaking.

2. This comment is outside the scope of this rulemaking. This rulemaking is not the appropriate place to grant authority to the courts.

3. This comment is outside the scope of this rulemaking. The current statutory framework allows for stipulated penalties in consent agreements. CIWMB staff are currently revising 14 CCR, section 18304 to address provisions of stipulated orders. The Financial Assurances Enforcement Regulations reference this section under 22272. Therefore, specific provisions of stipulated orders will be addressed in a future rulemaking.

4. This comment is outside the scope of this rulemaking. CIWMB staff are currently revising 14 CCR, section 18304 to address provisions of compliance orders. The Financial Assurances Enforcement Regulations reference this section under 22272. Therefore, specific provisions of compliance orders will be addressed in a future rulemaking.

5. This comment is outside the scope of this rulemaking. This comment may best be addressed in regulations which generally addresses failure to correct violations. CIWMB staff are currently revising 14 CCR, section 18304 to address provisions of compliance orders. The Financial Assurances Enforcement Regulations reference this section under 22272. Therefore, specific provisions to impose moratoriums on additional waste receipts may be addressed in a future rulemaking.

6. The discussion focusing on Federal financial assurance requirements and the financial test are outside the scope of this rulemaking. Adding a financial assurance mechanism to the requirements is more appropriate under 27 CCR, Chapter 6, Subchapter 2. The new Subchapter 2 is being added to 27 CCR, as part of the AB 1220 regulatory project.